

ENTERED

March 13, 2019

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 4:17-CR-00388-3
	§	
MUHAMMAD ARIF	§	

ORDER

Before the Court are Defendant Muhammad Arif's Motion to Suppress ("Motion") (Doc. #60), the Government's Response (Doc. #68), and Defendant's Reply (Doc. #71). After reviewing the parties' arguments and the applicable legal authority, the Court denies Defendant's Motion.

I. Background

Defendant Muhammad Arif ("Arif") was charged by grand jury indictment on June 29, 2017, with three counts of aiding and abetting and one count of conspiracy to unlawfully distribute and dispense controlled substances. 21 U.S.C. §§ 841, 846; 18 U.S.C. § 2; Doc. #1 at 4, 7. The indictment alleges that Arif was not licensed to practice medicine, did not maintain a Drug Enforcement Administration ("DEA") Registration Number, posed as a physician, saw patients, and illegally prescribed medications. Doc. #1 at 4 ¶ 11. On June 30, 2017, Arif was taken into custody and questioned by DEA agents. The questioning of Arif gives rise to this Motion.

While in custody on June 30, 2017, Arif was interviewed by a DEA special agent ("Agent 1") and a Diversion Investigator ("Agent 2"). Agent 1 began the custodial interrogation of Arif by apprising him of the charges against him and then proceeded to inform Arif of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that a person in

custody must be “warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”) (“*Miranda* warning”). Specifically relevant to this Motion, Agent 1 advised Arif of his right to counsel as follows:

Agent 1: You have the right to talk to a lawyer for advice before we ask you any questions, and to have a lawyer with you during questioning. If you cannot afford a lawyer one will be appointed to you before any questioning if you wish.
Do you understand?
Arif: Yes sir.

Ex. N-63, Audio.¹

The dialogue that followed the *Miranda* warning is the subject of this Motion. After Agent 1 advised Arif of his *Miranda* rights, the interaction proceeded as follows:

Agent 1: Are you willing to answer some questions?
Arif: *Can I talk to my wife? To go for the lawyer?*
Agent 1: Ok, so, but I need a yes or a no to this question, are you willing to answer questions now?
Arif: Yea I am willing to answer.
Agent 1: Ok. Um. But I want you to, want you to be clear that I just gave you the opportunity to have a lawyer present, and . . .
(phone rings)
Arif: *This is what I want to do, ask you, that I want to talk to, because I only have my wife's number, I can talk to her and tell her to let me talk to the lawyer.*
Agent 1: Ok, so you, so . . .
Agent 2: What he is trying to ask you is this, do you want a lawyer present with you during questioning?
Arif: No.

¹ In this case, there is an audio recording of the interaction between the DEA agents and Arif. Therefore, the Court analyzes the facts and the intonational context of Arif's statements in light of the audio recording. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (stating that when a videotape exists, the factual issues should be viewed “in the light depicted by the videotape”).

Agent 2: Or do you mind answering questions without a lawyer present? It's up to you, it's your choice, you have a right to have a lawyer present with you during questioning.

Arif: I can answer the questions.

Agent 2: It's up to you, it's, it's . . .

Arif: I can answer the questions.

Agent 1: Ok. Alright. Um . . .

Agent 2: So, you agree to answering the questions without a lawyer present.

Arif: Ok.

Ex. N-63, Audio (emphasis added).

Arif now moves to suppress the statements he made during the custodial interrogation and anything obtained therefrom. Doc. #60 at 15. As the basis for his Motion, Arif argues that the DEA agents violated his Fifth Amendment right to counsel by continuing to question him after he requested a lawyer. Conversely, the Government argues that the statements made by Arif concerning a lawyer were not “clear and unambiguous” requests for counsel, and therefore the continued questioning of Arif was not unlawful. Doc. #68 at 8. Alternatively, Arif argues that even if he failed to invoke his right to counsel, suppression is still proper because any waiver of his right to counsel was involuntary in that it was obtained by the DEA agents through deceptive means.

II. Legal Standard

“[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation” *Miranda*, 384 U.S. at 471. “A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police” without the assistance of a lawyer. *Davis v. United States*, 512 U.S. 452, 460–61 (1994). Waiver of the *Miranda* right to counsel may be direct or, in some instances, it may “be clearly inferred from

the actions and words of the person interrogated.” *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). If the individual “effectively waives his right to counsel” after he was informed through the *Miranda* warning of his right to have an attorney present, law enforcement officers are free to question him. *Davis*, 512 U.S. at 458 (citing *Butler*, 441 U.S. at 372–76).

However, when an individual clearly asserts his right to counsel, law enforcement officers must immediately cease questioning him. *Davis*, 512 U.S. at 454 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). In order to qualify as an assertion of the right to counsel, an individual’s request must be unambiguous or unequivocal, and sufficiently clear such “that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis*, 512 U.S. at 459. Therefore, if an individual “makes a statement concerning the right to counsel ‘that is ambiguous or equivocal’ or makes no statement, the police are not required to end the interrogation” *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (citing *Davis*, 512 U.S. at 461–62).

Although a defendant “need not ‘speak with the discrimination of an Oxford don,’” he must “clearly articulate his desire to have an attorney present.” *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002) (en banc) (citing *Davis*, 512 U.S. at 459). “*Davis* established a bright-line rule, under which ‘a statement either is [] an assertion of the right to counsel or it is not.’” *Id.* The Supreme Court acknowledged that “requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.” *Davis*, 512 U.S. at 460. Accordingly, “if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

circumstances would have understood only that the suspect *might* be invoking the right to counsel,” law enforcement officers are not required to cease the interrogation. *Id.* at 459 (holding that the remark, “Maybe I should talk to a lawyer,” was not a request for counsel).

III. Analysis

A. Whether Arif’s statements were clear, unambiguous, unequivocal requests for counsel that required DEA agents to cease questioning him.

It is not disputed that Arif was in custody and was both advised of and understood his *Miranda* rights. The audio recording reveals that the DEA agents explained the *Miranda* rights to Arif and he affirmatively stated that he understood his rights. Ex. N-63, Audio. What is disputed is whether Arif’s statements concerning a lawyer were clear invocations of his right to counsel. Although Arif mentioned a lawyer after he was read the *Miranda* warning, the Government argues that Arif’s statements were ambiguous.

Statements are ambiguous or equivocal when a reasonable law enforcement officer “would have understood only that a suspect *might* be invoking the right to counsel.” *Davis*, 512 U.S. at 459. The Fifth Circuit explained that a statement is ambiguous and not a clear invocation of the right to counsel when the defendant is “asking for advice on whether or not to obtain an attorney,” is questioning “how to obtain an attorney,” or is inquiring “how long it will take to get an attorney.” *Soffar*, 300 F.3d at 595 (citations omitted). Additionally, courts have found that requests to make phone calls to family members and lawyers are not clear invocations of the right to counsel. *See United States v. Wheeler*, 84 F. App’x 304, 306 (4th Cir. 2003) (the request to call a family member “to see about a lawyer” was not “a clear, unambiguous request for counsel”); *see also Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001) (the question, “Could I call my lawyer?” made after the defendant asked “if he could call his girlfriend” was

not an unambiguous request for counsel).

Here, Arif twice asked if he could call his wife and then mentioned a lawyer. First he asked, “Can I talk to my wife? To go for the lawyer?” Ex. N-63, Audio (the intonation of these statements indicates that these were questions).² Then he stated, “This is what I want to do, *ask you*, that I want to talk to, because I only have my wife’s number, I can talk to her and tell her to let me talk to the lawyer.” *Id.* (emphasis added).

Neither of Arif’s statements was a clear request for an attorney. At best, the statements are similar to those in *Wilkinson* and *Wheeler*, wherein both courts found that inquiries concerning whether a defendant could make phone calls to family members and lawyers were not unambiguous requests for counsel. In *Wilkinson*, a defendant asked whether he could call his girlfriend and then asked, “Could I call my lawyer?” 249 F.3d at 805. The court held that Wilkinson’s statement was not an unambiguous request for counsel. *Id.* (explaining that a police officer could have reasonably believed in the circumstances that the defendant was “merely inquiring whether he had a right to call a lawyer, rather than believing that [the defendant] was actually requesting counsel”). In *Wheeler*, the court analyzed a statement very similar to those made by Arif and held that the defendant’s statement “that he wanted to ‘call [his] family to see about a lawyer,’” was “not a clear, unambiguous request for counsel.” 84 F. App’x at 306. A reasonable law enforcement officer could have understood that Arif was inquiring whether he was allowed to make a phone call to his wife and whether she could contact a lawyer for him, not that he was actually requesting counsel. Accordingly, Arif’s statements were ambiguous. Therefore,

² The “intonational context” of the statement can assist the court in determining whether a statement is an informational request or an invocation of the right to counsel. *See United States v. Hawkins*, 554 F.Supp.2d 675, 680–81 (N.D. Tex. 2008) (finding the statement, “Could I get my lawyer to come now?” in its “intonational context” was not an unambiguous request for an attorney but rather a clarifying question).

the Court finds that Arif's inquiries mentioning a lawyer were not clear assertions of the right to counsel.

Furthermore, after Arif made the ambiguous statements mentioning his wife and a lawyer, the DEA agents asked him clarifying questions concerning his intent and desire to have a lawyer present during questioning. The Supreme Court recognized that although officers are not required to ask clarifying questions, "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *Davis*, 512 U.S. at 461. In response to Agent 2's clarifying questions regarding whether Arif wanted a lawyer present during questioning he said, "No," and then twice stated, "I can answer the questions." Ex. N-63, Audio.

Because Arif did not clearly and unambiguously ask for a lawyer to be present during questioning, the DEA agents did not violate his Fifth Amendment right to counsel.³ Not only did Arif make ambiguous statements, but he also expressly agreed to proceed with the questioning without an attorney present when the DEA agents asked him clarifying questions. Therefore, Arif's Motion is denied as to his argument that he clearly invoked his right to counsel.

B. Whether Arif's waiver of his right to counsel was involuntary.

An individual "who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives" those rights provided that he did so voluntarily. *Thompkins*, 560 U.S. at 388–89. Waiver is voluntary when "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 382 (quoting *Moran v. Burbine*, 475 U.S.

³ In his Reply, Arif argues that because he was questioned postindictment the DEA agents' actions may have also violated the Sixth Amendment. Doc. #71 at 6. However, the analysis of whether a defendant waived his right to counsel in the context of custodial interrogation is the same regardless of whether the defendant argues there was a violation of the Fifth or Sixth Amendment. *Patterson v. Illinois*, 487 U.S. 285, 297–99 (1988).

412, 421 (1986)). Arif argues that even if he did not clearly invoke his right to counsel after he was informed of his *Miranda* rights, any waiver of his rights was invalid because it was obtained by the DEA agents through deceptive means.


“[T]rickery or deceit is only prohibited to the extent it deprives the suspect ‘of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.’” *Soffar*, 300 F.3d at 596 (quoting *Burbine*, 475 U.S. at 424). Arif construes the DEA agents’ clarifying questions—inquiring whether he wanted an attorney present during questioning—as “deceptive tag-teaming and fast-talking.” However, the audio recording does not indicate the DEA agents’ clarifying questions deprived Arif of understanding the rights he was waiving, in fact the opposite. The DEA agents clarified whether Arif desired to have an attorney present with him. Also, they ensured that Arif understood that he had the right to have a lawyer present before they continued questioning him. Nothing indicates that Arif’s answers to the clarifying questions were a product of anything other than his informed and voluntary choice to proceed with the interrogation without an attorney present. Therefore, Arif’s Motion is denied as to his argument that waiver of his right to counsel was involuntary.

IV. Conclusion

For the foregoing reasons, the Court finds that Arif’s statements concerning a lawyer were not unambiguous such that a reasonable police officer in the circumstances would have understood his statements to be a clear request for counsel. Additionally, the Court finds that Arif’s waiver of his right to counsel was voluntary. Accordingly, Defendant’s Motion is hereby DENIED.

It is so ORDERED.

MAR 12 2019
Date



The Honorable Alfred H. Bennett
United States District Judge